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Attorneys for Plaintiff Microspherix LLC

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

MICROSPHERIX LLC,

Plaintiff,

v.

MERCK SHARP & DOHME CORP., MERCK
SHARP & DOHME B.V., AND ORGANON
USA, INC.,

Defendants.

Civil Action No. 2:17-cv-03984-CCC-MF

**PLAINTIFF'S NOTICE OF PARTIAL
MOTION TO DISMISS DEFENDANTS'
SECOND, FOURTH, AND SIXTH
COUNTERCLAIMS AND STRIKE
DEFENDANTS' SECOND AND NINTH
DEFENSE**

Document Filed Electronically

Return Date: November 2, 2020

ORAL ARGUMENT IS REQUESTED

PLEASE TAKE NOTICE that on November 2, 2020, or as soon the Court deems appropriate, the undersigned attorneys for Plaintiff Microspherix LLC ("Microspherix") shall move before the Honorable Claire C. Cecchi, United States District Judge, for an Order granting Microspherix's Partial Motion to Dismiss Defendants Merck Sharp & Dohme Corp., Merck Sharp & Dohme B.V., and Organon USA, Inc.'s (collectively, "Merck") Second, Fourth, and Sixth Counterclaims and Strike Merck's Second and Ninth Defenses on the grounds and bases set forth

in the accompanying Brief in Support and reflected below:

- Partially dismiss under Rule 12(b)(6) Merck's Second, Fourth, and Sixth Counterclaims and strike under Rule 12(f) Merck's Second Defense that are based on anticipation and obviousness theories of invalidity that were raised or reasonably could have been raised in the related *inter partes* review proceedings;
- Partially dismiss under Rule 12(b)(6) Merck's Second, Fourth, and Sixth Counterclaims and strike under Rule 12(f) Merck's Second Defense for failure to plead all the elements of 35 U.S.C. § 102(g)(2); and
- Strike under Rule 12(f) Merck's Ninth Defense as bare bones conclusory allegations that prejudice Microspherix and could not possibly prevent recovery under any pleaded or inferable set of facts.

PLEASE TAKE FURTHER NOTICE that in support of this Motion, Microspherix will rely upon the accompanying Brief in Support of its Motion, the Declaration of Tasha Francis Gerasimow and exhibits annexed thereto, any reply papers in support of its Motion, and oral argument, if any.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order is submitted herewith.

Dated: October 2, 2020

Respectfully submitted,

/s/ David N. Draper

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